STATE OF MICHIGAN

COURT OF APPEALS

TINA SUMMERS,

Plaintiff-Appellant,

v

HURLEY MEDICAL CENTER, PATHOLOGY ASSOCIATES, P.C., GARY JOHNSON, CATHY O. BLIGHT, JERRY S. KRZNARICH, and LINDA BIEDRZYCKI,

Defendants-Appellees

and

MARCIA E. PERRY,

Defendant.

UNPUBLISHED
August 23, 2007

No. 269824
Genesee Circuit Court
LC No. 05-081687-CZ

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing this case, with prejudice, with respect to each defendant-appellee. We affirm the order of dismissal, but vacate the portion of the trial court's April 3, 2006, order awarding attorney fees and costs to defendant Hurley Medical Center.

On June 20, 2005, plaintiff filed a complaint against the six defendants-appellees, Hurley Medical Center (hereafter "Hurley Medical"), Pathology Associates, P.C. (hereafter "Pathology P.C."), Lynda Biedrzycki,[1] Jerry Krznarich, Gary Johnson, and Cathy Blight, and two other defendants, Hurley Health Services and Marcia Perry, arising out of the alleged mishandling of her son's body after he died on March 15, 2001. The complaint alleged that the decedent's heart

[1] Although the April 12, 2006, order and this Court's docket caption identify Biedrzycki's first name as "Linda," the original complaint contained the spelling "Lynda," consistent with Biedrzycki's own appeal brief.

was removed, without plaintiff's knowledge or authorization, as part of an autopsy to determine the cause of death. The heart was allegedly transferred to Biedrzycki, a medical examiner in the state of Wisconsin, for an examination, but was not returned to Michigan until March 2004. Plaintiff allegedly made several inquiries regarding the status of the autopsy and learned about the removal of the decedent's heart before Biedrzycki returned the heart to Michigan. Plaintiff alleged claims against the various defendants based on gross negligence (Count I), ordinary negligence (Count II), interference with right of burial (Count III), negligent infliction of emotional distress (Count IV), and intentional infliction of emotional distress (Count V).

Answers to the complaint were thereafter filed by Johnson and Biedrzycki in August 2005, and by Blight and Hurley Health Services in September 2005. On October 17, 2005, the trial court entered a stipulated order granting Hurley Medical's motion for a more definite statement. The trial court ordered that plaintiff file a more definite statement with respect to each defendant. Despite being afforded two opportunities to do so, plaintiff failed to conform her complaint to the trial court's ruling leading to the ultimate dismissal of her action.

On appeal, plaintiff first challenges the trial court's December 12, 2005, order requiring that she file a second more definite statement. In general, a plaintiff's claims may be involuntarily dismissed for failure to comply with the court rules or a court order. MCR 2.504(B)(1). A dismissal for failure to comply with a court order is reviewed for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Such a dismissal is a drastic sanction that requires consideration of several factors, including:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995) (citation omitted).]

In this case, it is apparent that the trial court did not rely solely on plaintiff's failure to comply with its order requiring plaintiff to file a second more definite statement when dismissing the case, but also considered the merits of plaintiff's various claims with respect to both the notice of a claim that it afforded to defendants-appellees and whether the allegations were sufficient to state a claim. Here, plaintiff argues that a second amended complaint was unnecessary because her earlier more definite statement was sufficient to both provide adequate notice and state a claim.

"Each allegation in a pleading must be clear, concise, and direct." MCR 2.111(A)(1). The complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1); see also *Iron Co v Sundberg, Carolson & Assocs, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997). The degree of specificity sufficient to satisfy the court rule generally depends on the circumstances of the case and the nature of the action. *Dacon v Transue*, 441 Mich 315, 332; 490 NW2d 369 (1992); *Porter v Henry Ford Hosp*, 181 Mich App 706, 709; 450 NW2d 37

(1989); *Martinez v Redford Community Hosp*, 148 Mich App 221, 229-230; 384 NW2d 134 (1986); but see MCR 2.112(B)(2) (conditions of the mind may be pleaded generally).

We review a trial court's decision regarding the meaning and scope of a pleading for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court's decision on a defendant's motion for a more definite statement or to strike a pleading that allegedly is so vague or ambiguous that it does not conform with the rules, is also reviewed for an abuse of discretion. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). A trial court abuses its discretion when its decision "results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

But if a defendant's real challenge to the complaint is that the complaint does not state a claim, the motion may be treated as a motion for summary disposition under MCR 2.116(C)(8). See *Hetterle v Chido*, 155 Mich App 582, 586; 400 NW2d 324 (1986). Such as motion is reviewed de novo based on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. Summary disposition is appropriate only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.* Conclusory statements, unsupported by factual allegations, are insufficient to state a claim. *Ypsilanti Fire Marshal v Kircher (On Reh)*, 273 Mich App 496, 544; 730 NW2d 481 (2007). Similar to the discretion afforded to a trial court under MCR 2.115, to grant a defendant's motion for a more definite statement, a plaintiff against whom summary disposition is granted under MCR 2.116(C)(8) may move to amend the complaint. See MCR 2.116(I)(5); *Weymers*, *supra* at 654.

In this case, considering that plaintiff brought multiple counts against multiple defendants and that the record discloses that the trial court believed that summary disposition motions would likely be filed if a more definite statement was not provided, we find merit to plaintiff's argument that MCR 2.116(C)(8) might provide a more appropriate framework for determining the sufficiency of some of her claims against defendants-appellees than the standard in MCR 2.111(B). But having considered the allegations in the first more definite statement, we conclude that plaintiff has not demonstrated any claim that was sufficiently pleaded to render the need for another more definite statement, or an amended complaint, unnecessary.

With respect to Pathology Associates, P.C., the more definite statement only alleges that this entity was at all relevant times a professional service corporation doing business in the city of Flint. Thus, the trial court did not abuse its discretion in finding that plaintiff failed to sufficiently plead a claim against Pathology Associates. *Weymers*, *supra* at 454. Plaintiff did not provide allegations that are specific enough to reasonably inform Pathology Associates of the nature of any claim against it. MCR 2.111(B)(1); *Iron Co*, *supra* at 124.

With respect to the five other defendants-appellees, we agree with plaintiff that the use of "group" allegations against multiple defendants in a pleading is not fatal to a determination that MCR 2.111(B) was satisfied, at least in those circumstances where there exist other allegations directed at a defendant's specific conduct to provide reasonable notice of the claim. *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719, 723; 683 NW2d 229 (2004). Plaintiff's reliance on the afore-stated concept ignores the fact that her "group"

allegations were insufficient to reasonably inform the individual defendants-appellees of the nature of the claims against them, as required by MCR 2.111(B). On their face, the "group" allegations suggest some type of concerted action between the individual defendants-appellees located in Michigan in their dealings with the other defendant-appellee, Lynda Biedrzycki, who is located in Wisconsin. The trial court reasonably concluded otherwise, as is evident by its determination that plaintiff needed to file another more definite statement to direct the allegations at the specific defendant-appellee to which they applied. Further, upon considering the allegations that are directed at a specific defendant-appellee, we conclude that the trial court did not abuse its discretion in finding that a second more definite statement was necessary.

The non-group allegations against Hurley Medical Center are ambiguous with respect to whether plaintiff was attempting to hold Hurley Medical Center directly liable or indirectly responsible under some theory of vicarious liability. Vicarious liability rests on imputing the agent's conduct to the principal. *Al-Shimmari v Detroit Medical Center*, 477 Mich 280, 294; 731 NW2d 29 (2007) (negligence). Direct liability may arise, for example, where an entity negligently supervises, selects, or retains staff. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002) (medical malpractice action against hospital). Therefore, as with Pathology Associates, we conclude that the trial court did not abuse its discretion in ruling that plaintiff's allegations with respect to Hurley Medical were not specific enough to reasonably inform it of the nature of any claim against it.

Each of the four individual defendants-appellees allegedly had some role, in a medical examiner capacity, in handling the body of plaintiff's deceased son or authorizing autopsy work, which resulted in the removal and retention of the decedent's heart for further examination. Defendant Jerry Krznarich allegedly performed the autopsy, with the authorization of defendant Gary Johnson, the county medical examiner, and defendant Cathy Blight, the chief deputy county medical examiner, and spoke with plaintiff about the status of the autopsy and cause of death. Biedryncki allegedly received the decedent's heart in 2001, for an examination concerning the cause of death, but did not return the heart to the other defendants-appellees until 2004, long after plaintiff buried her son.

For each of the five counts, plaintiff predicated her right to relief on her parental relationship with the decedent, alleging in Count III a claim based on the common-law tort of interference with the right of burial of a deceased person without mutilation. The recovery in such an action is for the infringement of the person's right to have the body delivered for burial without mutilation, *Deeg v Detroit*, 345 Mich 371, 376; 76 NW2d 16 (1956), although the failure to return severed portions of a body for burial can also form a basis for the action. See 22A Am Jur 2d, Dead Bodies, § 46.

But an essential element of the tort is that the alleged mutilation be wrongful. *Tillman v Detroit Receiving Hosp*, 138 Mich App 683, 689-690; 360 NW2d 275 (1984); *Allinger v Kell*, 102 Mich App 798, 808; 302 NW2d 576 (1981), modified 411 Mich 1053 (1981). Here, plaintiff made vague "group" allegations in the gross negligence and negligence counts regarding the individual defendants-appellees having a duty to refrain from violating the law affecting the handling, custody, care, and transportation of dead human body remains. But plaintiff did not plead any law that was violated or attempt to assign responsibility to any specific defendant-appellee for particular acts of unlawful or wrongful conduct.

Under the circumstances, where multiple individual defendants allegedly took on different roles in the autopsy process, all in some type of medical examiner capacity, the trial court did not abuse its discretion by ordering another more definite statement to delineate the basis of plaintiff's claims. As a whole, the allegations in the more definite statement failed to provide reasonable notice of what plaintiff believed was unlawful interference with respect to each individual defendant-appellee, as required by MCR 2.111(B). Alternatively, plaintiff failed to state a claim for which relief could be granted, because Count III is based on conclusory statements, unsupported by factual allegations of any actionable unlawful interference by any individual defendant-appellee. MCR 2.116(C)(8); *Ypsilanti Fire Marshal*, *supra* at 544. Accordingly, we find no basis for disturbing the trial court's decision to dismiss Count III with respect to any individual defendant-appellee.

With respect to the separate gross negligence and negligence claims in Counts I and II of the more definite statement, we uphold the trial court's decision that a more definite statement was necessary to the extent that plaintiff's claims were predicated on the same alleged parental burial rights underlying Count III. We are not bound by a party's choice of labels for an action because this would place form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The tort of interference with the right of burial can be grounded on negligent or intentional conduct. *Allinger*, *supra* at 808.

To the extent that plaintiff attempted to plead a gross negligence or ordinary negligence claim that falls outside the common-law tort of interference with a right of burial, we uphold the trial court's decision because plaintiff did not plead a relationship with any individual defendant-appellee that gives rise to a duty. See *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992) (duty concerns whether a defendant is under any obligation to act for the plaintiff's benefit), *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999) (duty can arise by statute, contract, or common-law principles). "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Fultz v Union-Commerce Assocs*, 470 Mich 460, 463; 683 NW2d 587 (2004), quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). Summary disposition is proper under MCR 2.116(C)(8) if the defendant does not owe a duty to the plaintiff under the alleged facts as a matter of law. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001); *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

Turning to plaintiff's claim in Count IV, negligent infliction of emotional distress, we note that this is a limited tort that is recognized where a person witnesses the negligent injury or death of a third person. It has not been extended to other situations. *Duran v Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1994); *Gustafson v Faris*, 67 Mich App 363, 369, 241 NW2d 208 (1976); see also *Nugent v Bauermeister*, 195 Mich App 158, 161; 489 NW2d 148 (1992) (tort is limited to immediate family members). Although plaintiff alleged a parental relationship with the decedent, she has not substantiated her position that the tort applies to the allegations set forth in the more definite statement regarding the circumstances of the autopsy. Contrary to MCR 2.111(B), plaintiff's vague allegations that the "events alleged herein" caused her severe emotional distress were insufficient to reasonably inform the individual defendants-appellees of this novel theory or how it applies to each of them. At best, plaintiff's vague allegations appear to be an attempt to restate Count III. Therefore, the trial court did not abuse its discretion in ordering another more definite statement.

Finally, we reject plaintiff's claim that she plainly pleaded a claim for intentional infliction of emotional distress in Count V. Although an intention may be alleged generally, MCR 2.112(B)(2), the allegation regarding the action of Hurley Medical Center and each individual defendant-appellee is too vague to provide reasonable notice of the extreme and outrageous conduct that each individual defendant-appellee was claimed to have intentionally or recklessly committed. MCR 2.111(B). Alternatively, we uphold the trial court's decision to require another more definite statement because the conclusory allegation was insufficient to state a claim pursuant to MCR 2.116(C)(8). See *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004).

In sum, the trial court reached the right result in ordering another more definite statement, regardless of whether MCR 2.111(B) or MCR 2.116(C)(8) provides the appropriate framework for reviewing the five counts in the more definite statement. Accordingly, plaintiff has not demonstrated any error affecting the trial court's subsequent April 12, 2006, order dismissing the case with respect to each individual defendant-appellee.

Plaintiff also argues that the trial court erred in awarding attorney fees and costs in favor of Hurley Medical Center in its April 3, 2006, order. Because Hurley Medical Center agrees on appeal that the award does not comport with any ruling made by the trial court, we vacate the portion of the court's order awarding attorney fees and costs to Hurley Medical Center. See *McDonald's Corp v Canton Twp*, 177 Mich App 153, 158-159; 441 NW2d 37 (1989).

Affirmed in part and vacated in part.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello